



Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
T +1 202 637 5600
F +1 202 637 5910
www.hoganlovells.com

November 15, 2019

BY CERTIFIED MAIL

Freedom of Information Officer
National FOIA Office
United States Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2310A)
Washington, D.C. 20460

Re: Freedom of Information Act Request

Dear FOIA Officers:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), I write to request information, as described in detail further below, from the United States Environmental Protection Agency ("EPA"), through the Office of Air and Radiation, relating to Acting Assistant Administrator Anne Idsal's October 25, 2019 determination denying Suncor Energy (U.S.A.) Inc.'s ("Suncor") December 28, 2018 petitions that its two Commerce City, Colorado refineries ("the East Refinery" and "the West Refinery") each be granted a one-year "small refinery" exemption from the Clean Air Act's Renewable Fuels Standards ("RFS") program.

As you are aware, on June 30, 2016, President Obama signed into law the FOIA Improvement Act of 2016, which codified the presumption of openness policy established in January 2009 by President Obama for releasing Government information under FOIA. As emphasized by Congress, the intent of the law is to "mandate[] that an agency may withhold information only if it reasonably foresees a specific identifiable harm to an interest protected by an exemption, or if disclosure is prohibited by law." See S. Rep. No. 114-4 at 4 (2015). In establishing this policy, which is now codified by law, President Obama stated that agencies may not withhold information from the public "merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears." President Barack Obama, *Memorandum for the Heads of Executive Departments and Agencies, Subject: Freedom of Information Act* (Jan. 21, 2009). Specifically, the law establishes a new, rigorous standard for disclosure by requiring that "an agency shall withhold information under this section only if (I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption...or (II) disclosure is prohibited by law." 5 U.S.C. § 552(a)(8)(A)(i)(I)–(II). In context of existing FOIA disclosure requirements, this amendment requires that agencies must explain the basis for reasonably foreseeing a specific identifiable harm to a protected interest -- with respect to *each*

portion of withheld records -- in the course of designating from release pursuant to one of the exemptions listed under section 552(b) and the standards established in section 552(a)(8), all reasonably segregable portions must still be provided. See *id.* § 522(b). We expect these standards to be rigorously applied and thoroughly documented in processing this request.

Accordingly, I hereby request all records and information considered, created, sent, or received by EPA or DOE in connection with the review and determination of Suncor's December 28, 2018 petitions for a small refinery exemption from the RFS program for the 2018 RFS compliance year, including, but not limited to, (i) all such records and information relating to EPA's determination that the East Refinery and West Refinery now function as a single refinery, and (ii) any and all policy documents, procedures, protocols, practices, guidance documents, standards, analysis, studies, reports, regulations, past findings or determinations, comparative analyses, studies, or reports, and/or petitions of other applicants considered. This request further includes but is not limited to:

1. All records relating to communications involving Acting Assistant Administrator Anne Idsal and/or other EPA or DOE personnel, conducted formally or informally, regarding the review process for Suncor's petitions for a one-year small refinery exemption from the requirements of the RFS program for Suncor's two refineries in Commerce City, Colorado for the 2018 RFS compliance year. This request includes, but is not limited to, memoranda, phone logs, notes, meeting notes, calendar entries, schedules, requests for meetings, and any event planning documents including talking points and also includes any information prepared or in the possession of EPA or DOE regarding the East Refinery and West Refinery, including with regard to the facility registrations of the East Refinery and West Refinery for EPA programs.
2. All records relating to the statement on page 2 of the determination letter that "Suncor has since done significant work to integrate the process operations of the two facilities so that they now function as a single refinery," including records of EPA's and DOE's "own research of Suncor's operations" noted on page 3 of the determination letter.
3. All records relating to EPA's determination that the East Refinery and West Refinery are ineligible for a small refinery exemption, including EPA's determination that the East Refinery and West refinery now function as a single refinery, prepared by DOE or EIA for EPA's review of Suncor's petitions and/or published by DOE or EIA that EPA considered when reviewing Suncor's petitions. This request includes, but is not limited to, memoranda, phone logs, meeting notes, calendar entries, schedules, requests for meetings, and any event planning documents including talking points and also includes any information prepared or in the possession of EPA or DOE regarding the East Refinery and West Refinery, including with regard to the facility registrations of the East Refinery and West Refinery for EPA programs.

This FOIA Request is not meant to be exclusive of any other records which, though not specifically requested, would have a reasonable relationship to the subject matter of this request. With respect to the form of production, see 5 U.S.C. § 522(a)(3)(B), I request that responsive documents be provided electronically in text-searchable, static-image format (PDF), in the best image quality in the agency's possession. I further request that reasonable metadata be transmitted along with responsive documents, including but not limited to email attachments, author and recipient information, date and time stamps, and the like.

Defined Terms

The term "DOE" as used herein refers to the Department of Energy and includes all offices, and all officers, staff, agents, consultants, political appointees, and employees thereof.

The term "EPA" as used herein refers to the Environmental Protection Agency and includes all offices, and all officers, staff, agents, consultants, political appointees, and employees thereof.

The term "EIA" as used herein refers to the Energy Information Administration and includes all offices, and all officers, staff, agents, consultants, political appointees, and employees thereof.

The term "Recipients" as used herein means all entities, department, agencies, offices, and/or bureaus of the U.S. Federal Government to which this FOIA request is directed, including EPA.

The term "records" as used herein includes the original and all non-identical copies, however produced or reproduced, of any written or graphic matter, as well as computer files, including but not limited to writings, handwritings, drawings, graphs, charts, maps, correspondence, faxes, electronic mail (i.e., e-mails), attachments to electronic mail, any other electronic communications, notes of telephone conversations or of meetings or conferences, minutes of meetings, interoffice communications, memoranda, studies, analyses, results of investigations, photographs, sound recordings, electronically stored information, other data compilations from which information can be obtained, and any other documentary material, regardless of physical form or characteristics.

The term "relating to" as used herein means addressing, constituting, mentioning, discussing, describing, reflecting, identifying, dealing with, consisting of, explaining, referring to, containing, enumerating, or in any way concerning or pertaining to, in whole or in part, directly or indirectly.

FOIA Response

The records requested herein relate to the October 25, 2019 determination that Suncor's two refineries in Commerce City, Colorado do not meet the definition of "small refinery" in the Clean Air Act and its implementing regulations for the 2018 RFS compliance year.

These records are not exempt from disclosure. If Recipients should deny access to any records covered by this request, however, please describe in detail each of those records and specify the statutory basis claimed for denial as well as any reasons for asserting that claim. Specifically, please provide an exemption log identifying each document for which the exemption is claimed, together with the following information: date, sender, recipient, type (e.g. memorandum, telegram, chart, photograph, etc.), subject matter of the document, the basis on which exemption is claimed, and the paragraph or paragraphs of this request to which the document responds. As described above, FOIA provides that if only a portion of a record is exempt from release, all reasonably segregable portions shall be provided. Thus, if Recipients assert that a portion of a record that I have requested is exempt, please provide me with a copy of the remainder of the record and provide in the exemption log the information specified above for the portion being treated as

exempt. If Recipients assert that the exempt portions cannot be reasonably redacted, please state in detail the reasons for that assertion.

Please provide the requested material as soon as possible, but no later than FOIA's applicable deadline(s) for a response, and please provide the required response within the twenty (20) day period prescribed by FOIA. Please forward currently available records as soon as possible and others as they become available.

By codifying the presumption of openness through the FOIA Improvement Act of 2016, Congress has "put[] the force of law behind the notion that sunshine, not secrecy, is the default setting of our government." See Con. Rec. S3825 (daily ed. June 13, 2016 (statement of Sen. Leahy)). I look forward to receiving your response to this Request within (20) business days, as required under 5 U.S.C. § 522(a)(6)(A)(i) and 40 C.F.R. § 2.104(a). I reserve the right to appeal a decision to withhold any information.

Please furnish all responsive records electronically to:

Joseph Charlet
joe.charlet@hoganlovells.com

Should you need to communicate with me regarding this request, please contact me by email or phone using the information provided below. Thank you in advance for your assistance.

Sincerely,

/s/ Adam Kushner

Adam M. Kushner
Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street NW
Washington, DC 20004
adam.kushner@hoganlovells.com
(202) 637-5724